



NEW YORK
CITY BAR

December 7, 2022¹

**COUNCIL ON JUDICIAL
ADMINISTRATION**

FRAN HOFFINGER
CHAIR
150 EAST 58TH STREET, 16TH FLOOR
NEW YORK, NY 10155
Phone: (212) 421-4000
fhoffinger@hoffingerlaw.com

LITIGATION COMMITTEE

SETH D. ALLEN
CHAIR
26 BROADWAY, 19TH FLOOR
NEW YORK, NY 10004
Phone : (212) 344-5400
sallen@schlamstone.com

**STATE COURTS OF SUPERIOR
JURISDICTION COMMITTEE**

AMY D. CARLIN
CHAIR
40 WALL STREET, 32ND FL.
NEW YORK, NY 10005
Phone : (212) 530-4835
acarlin@lhr gb.com

By Email

Anthony R. Perri, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 100041
rulecomments@nycourts.gov

Re: New York City Bar Association Response to Request for Public Comment on Proposal to Amend Commercial Division Rule 36

Dear Mr. Perri:

We write to provide comments with respect to the Request for Public Comment on Amending Commercial Division Rule 36 to Clarify the Courts' Authority to Order Virtual Evidentiary Hearings and Bench Trials (the "Proposal").

¹ The City Bar is grateful for the two-week extension to submit these comments. The Committees engaged in significant deliberation and debate regarding the Proposal and, although not without some dissent, we are pleased to be in a position to submit our views for consideration.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

The City Bar’s Council on Judicial Administration, State Courts of Superior Jurisdiction, and Litigation Committees have considered and discussed the Proposal. As set forth herein, we suggest two changes to the Proposal and provide some related observations, which we hope that you will adopt.

First, subpart (a) of the proposed amendment to Rule 36 should be modified to provide that the court may conduct an evidentiary hearing or a non-jury trial utilizing video technology in the absence of consent or a motion by a party only upon a finding of good cause to do so.²

Second, we believe that the “good cause” standard in subpart (d) should be modified. Implicit in this rule is the concept that one party—over the objection of the other party—must make a showing of “good cause” to overcome the traditional preference for live proceedings. We believe that the “good cause” analysis must be tied to tangible factors, such as cost of travel, the location of the witnesses, health issues, and scheduling delays, as opposed to nebulous concepts such as the “*convenience to all parties involved.*” Some practitioners believe that virtual proceedings are more convenient and efficient, but not all prefer virtual proceedings to live proceedings, especially with respect to evidentiary hearings and bench trials. Further, if one party is making a motion to establish “good cause” to conduct a virtual proceeding, it necessarily means that the other party does not believe that a virtual proceeding is more efficient, convenient, or otherwise superior to a live proceeding. Otherwise, the parties would have stipulated to it.

Accordingly, we recommend that the proposed subpart (d) be modified, as follows:

(d) For all purposes under this Rule, the Court shall determine the existence of “good cause” by considering at least the following factors:

- (1) The necessity of conducting a virtual proceeding, dictated by considerations of, including but not limited to, the financial or other hardship of a party, attorney, or witness in traveling to the location of the trial or hearing;
- (2) Avoiding undue delay in case management and resolution;
- (3) The safety of the parties, counsel, and the witnesses, including whether counsel, the litigants, and the witnesses may safely convene in one location for the trial or hearing; and
- (4) Prejudice to the parties.

² We note that C.P.L.R. 4013 provides: “Upon stipulation of the parties, the judge who is to preside at the trial of an issue may direct trial in whole or in part at a specified place other than the courthouse.”

Thank you for considering our comments. If you believe that it would be beneficial, we would be happy to discuss these comments with you further.

Sincerely,

Fran Hoffinger, Chair
Council on Judicial Administration

Seth D. Allen, Chair
Litigation Committee

Amy D. Carlin, Chair
State Courts of Superior Jurisdiction

Contact: Maria Cilenti | Senior Policy Counsel | mcilenti@nycbar.org | 212.382.6655